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No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES C. HOBART,
Father of Elizabeth Beatrice Hobart,
Appellant

v.

RACHEL ELIZABETH HOBART,
Mother of Elizabeth Beatrice Hobart,
Appellee

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS APPEAL

C. V. DIEDEL,
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Rachel Elizabeth Hobart, mother of Elizabeth Beatrice Hobart and appellee herein—the original petitioner in the Probate Court of Miami County, Ohio, and the appellee in the Court of Appeals of Miami County, Ohio, and the Supreme Court of Ohio—moves under Rule 16 of this Court's Revised Rules that the appellant's appeal be dismissed for the reason, as provided in paragraph (b) of said Rule 16, that the federal questions sought to be reviewed were not timely or properly raised or expressly passed on.

STATEMENT AND ARGUMENT

Appellant appealed to the Supreme Court of Ohio the decision of the Court of Appeals of Miami County, Ohio, as of right; which appeal is permitted under Ohio judicial procedure in cases in which constitutional questions are involved, if such questions are timely raised. Appellant failed, however, until in the Supreme Court of Ohio, to challenge the constitutionality of the Ohio statute, and the procedure therein, by virtue of which the finding of mental illness and the hospitalization order were made in this case. His earlier failure to raise his constitutional questions in the Ohio courts was fatal to his appeal as of right to the Supreme Court of Ohio, under the authority of the following cases:

Zimmerman v. *Morris Plan Bank*, 1925, 113 Ohio State 703
Cuthbertson v. *State*, 1922, 106 Ohio State 658
Hoffman v. *Staley*, 1915, 92 Ohio State 505.

The record discloses that the appellant did not raise his constitutional or federal questions in either the trial court, i.e., in the Probate Court of Miami County, Ohio, or in the Court of Appeals for Miami County, Ohio; that, therefore, such questions were not timely raised under Ohio procedure; and that the Supreme Court of Ohio found itself without jurisdiction to decide such questions, and in fact did not decide the constitutional questions the appellant raised. The failure of the appellant to raise his federal questions at the proper time leaves this Court without jurisdiction also, and such failure is fatal to his appeal to the Supreme Court of the United States.

An Ohio case decided by this Court on a similar otion to dismiss is impressive authority for sustaining appellee's motion to dismiss the appeal:

Martin v. *City of Struthers*, 1942, 317 U.S. 589; 87 L.Ed. 483.

Appellee respectfully submits that her motion to ismiss appellant's appeal must be sustained.

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